of other evidence of more convincing nature [15] — a situation obviously more often, but not necessarily only, existing with regard to future events. Hence it is submitted that, given relevant evidence to which mathematical calculation is applicable, it should be equally admissible whether the *probandum* concerns the past or future.[16] There may, of course, be cases where the evidentiary facts to be used as basis of calculation will have such slight relevancy that it will be useless to use them, and of course their mathematical expression will be equally excluded. There may also be cases in which general data, standing alone, indicate a strong probability, but in which there is sufficient evidence relative to the particular event in question to make the mathematical probability based only on general knowledge have almost no value. Here the calculation would be superfluous also, although the general data might be relevant to assist in a proper understanding of the more specific evidence under consideration. But these are questions of auxiliary policy dependent upon the facts of particular cases, and it is submitted that no general rule should exclude the mathematical calculation of probability in any case where the facts are susceptible of such treatment.

ENFORCEMENT OF TRADE — UNION RULES TO PUNISH AN OUTSIDE PARTY. — Frequent discussions have left the field of labor litigation bereft of virgin charm. A Rhode Island case, however, is worthy of note because of its liberal view. *Rhodes Bros. Co.* v. *Musicians' Protective Union Local, etc.*, 92 Atl. 641.[1] The court in that case dissolved an injunction which had issued against a musicians' union restraining it from imposing fines on any of its members to prevent them from playing for the plaintiff. The musicians had been ordered not to enter the plaintiff's employment under a by-law of the association which prohibited any member from playing for any person who the directors might decide had broken a contract with one of the union.

When a combination resorts to conscription of neutrals, complicated questions arise beyond the scope of the present discussion, but the right of a trade union to require its own members to comply with its own rules seems simply a consequence of recognizing such unions as lawful associations. Some courts, however, while not questioning the right to inflict the drastic penalty of expulsion, have held that an outside party is illegally injured when fines or threat of fines are used to promote united action against him.[2] This seems a decidedly strange result, for as in these jurisdictions the fines are uncollectable, a member could readily avoid

---

[15] VENN, THE LOGIC OF CHANCE, ch. 5, § 5.

[16] To draw an example similar to that given by the court. Suppose, in a case where the presumption of death does not apply, it is desired to prove the death of an individual who has disappeared. The fact that if alive he would now have reached the age of ninety-five would certainly be relevant. Would it not also be permissible to show the proportionate number of persons who, reaching the age of the given individual when last heard from, also reach the age of ninety-five?

[1] For a more complete statement of this case see RECENT CASES, p. 718.

[2] L. D. Willcutt & Sons *v.* Driscoll, 200 Mass. 110, 85 N. E. 897; Martell *v.* White, 185 Mass. 255, 69 N. E. 1085 (traders' association); Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607 (traders' association). See 17 HARV. L. REV. 558, 20 *id.* 355, 22 *id.* 234.

them by submitting to expulsion.[3] So he would have no cause to fear them unless he feared expulsion more. It is difficult to see why any court should bar as "coercive" the less coercive method of the two. Perhaps the reason is that less than a century ago labor unions were everywhere held illegal as combinations in restraint of trade;[4] and although they are now generally said to be legal, some narrow limitations upon their activities may be due to an unconscious inclination to attach to them unjustly some of the stigma they formerly bore.[5] A union's rules and by-laws should be contracts binding upon its members unless there is something in the nature of the particular rule to make it illegal besides conflict with obsolete economic theories.[6] Looked at from this point of view a member in obeying the orders of the proper officers with regard to a matter in which he has agreed to place himself under their control is *primâ facie* not only doing no wrong, but is only doing his legal duty, and the officers are only doing their duty in enforcing his performance by the use of any reasonable means.[7] And these may in proper cases extend to fine,[8] expulsion,[9] or the threat of either,[10] without giving an outsider affected a right to complain. This should be equally true in jurisdictions holding that the fines are collectable and cannot be avoided by resignation from the union. The union member has voluntarily and legally submitted himself to the pressure, and made himself a member of the forces arrayed against the plaintiff.

The legality of the defendants' action then should depend solely upon the nature of the by-law that is being enforced, and the motive with which it is brought into operation against the plaintiff. Now the rule here invoked by the union would generally operate to punish the outside party for past acts more than to put pressure on him to do something in the future of pecuniary benefit to the association. Clearly rules thus punitive of outsiders should be sparingly recognized, and where they do not tend to benefit the union in any legitimate way or where the pre-

[3] See Martell *v.* White, 185 Mass. 255, 261, 69 N. E. 1085, 1088; Boutwell *v.* Marr, 71 Vt. 1, 9, 42 Atl. 607, 609.

[4] For the history of trade unions see Hitchman Coal & Coke Co. *v.* Mitchell, 202 Fed. 514–533; 25 HARV. L. REV. 465; ASSINDER, TRADE UNIONS, chs. i, iv.

[5] Even in Australia, where an advanced stand has been taken, vestiges of the old common-law views of restraint of trade long obtained. See Taffs *v.* Beaseley, 16 Austr. L. T. 59 (association of traders). Of course on common-law principles there is no difference as regards legality between combinations of laborers and combinations of traders, although sometimes the former appear to be treated more severely. *Cf.* Friendly Soc. *v.* Ingall, 28 T. L. R. 104 (C. A.) with Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, [1892] A. C. 25.

[6] Master Stevedores Ass'n *v.* Walsh, 2 Daly (N. Y.) 1; Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921; Osborne *v.* Greymouth, etc. Union, 30 New Zealand L. R. 634.

[7] Scott Stafford Opera House Co. *v.* Minneapolis Musicians' Ass'n, 118 Minn. 410, 136 N. W. 1092; Saulsbury *v.* Coopers' Int. Union, 147 Ky. 170, 143 S. W. 1018. Wabash R. Co. *v.* Hannahan, 121 Fed. 563, especially at p. 571.

[8] Jetton-Deckle Lumber Co. *v.* Mather, 53 Fla. 969, 43 So. 590; Rea *v.* Buckland, 11 West Australia L. R. 2 (traders). See Osborne *v.* Greymouth, etc. Union, *supra*, at pp. 636, 637; Amalgamated Soc. of Engineers *v.* Austr. Inst. of Marine Engineers, 3 C. A. R. 97, 101 (Australia).

[9] Bonn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119. See L. D. Willcutt & Sons *v.* Driscoll, 200 Mass. 110, 124, 140, 85 N. E. 897, 903, 910.

[10] Every enforcement of a rule involves at least a threat of disciplinary action, for otherwise there would be no enforcement but merely a voluntary cessation of work. Consequently the cases in n. 8 and n. 9, *supra*, stand for the legality of such threats.

dominating motive is vindictive,[11] it should be unlawful to enforce them. But it seems proper for an association to take concerted action [12] to inspire respect for contracts made with its members,[13] so long at least as the action taken extends no farther than a peaceable refusal to allow its members to offer their services.[14] The method used should not be illegal simply because it is indirect.[15]

Legal theory and criticism in this field have frequently fallen into the error of looking too much at the *plaintiff's* rights.[16] The right of the individual to a free market for his capital or labor has been disproportionately developed, while insufficient emphasis has been placed upon the recognized facts that under modern conditions free competition means combination,[17] that collective action by labor tends to fairer competition between capital and labor by putting the contracting units on more equal terms,[18] and that our complex economic system often calls for devious means of protecting self-interest. The problems generally presented are so much more economic than legal that legislation sooner or later seems inevitable to relieve courts of general jurisdiction from the burden of trying to solve them,[19] but it is none the less incumbent upon the courts not to take a narrow position in the meanwhile.

---

[11] Quinn *v.* Leatham, [1901] A. C. 490; Miller *v.* Collet, 32 New Zealand L. R. 994; Martell *v.* Victorian Coal Miners' Ass'n, 25 Australian L. T. 40, 120. (Contrary decision in the lower court adversely criticized in 17 HARV. L. REV. 140.) That the punishment in the above cases was inflicted specially and not within rules only makes the cases distinguishable on an additional ground. Departing from general tactics often attaches legal liability. See ASSINDER, TRADE UNIONS, 93. Thus the fact that the rule in Martell *v.* White, *supra*, n. 2, applied only to a single person goes far to distinguish that case. For a discussion of intent and motive in labor litigation see 20 HARV. L. REV. 256.

[12] As to the legal effect of combination see Sweeney *v.* Coote, [1906] 1 Ir. Ch. 51, 109; Scott Stafford Opera Co. *v.* Minneapolis Musicians' Ass'n, 118 Minn. 410, 414–415, 136 N. W. 1092, 1094.

[13] Schulten *v.* Bavarian Brewing Co., 96 Ky. 224, 28 S. W. 504 (traders); Brewster *v.* Miller's Sons Co., 101 Ky. 368, 41 S. W. 301 (traders). *Contra*, Giblan *v.* Nat. etc. Union, [1903] 2 K. B. 600; See 17 HARV. L. REV. 140.

[14] It is, of course, illegal for the union thus to cause a breach of contract. Lumley *v.* Gye, 2 E. & B. 216; South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239.

[15] The by-law in the principal case would be less open to criticism if it provided for adjudication of disputes by parties more disinterested than the union directors. *Cf.* Reynolds *v.* Davis, 198 Mass. 294, 84 N. E. 457. But their decision appearing to have been rendered *bonâ fide* after the plaintiff was given a fair hearing, it hardly seems that the case should turn on that point.

[16] See Rea *v.* Buckland, *supra*, at p. 8.

[17] See dissent of Holmes, J., in Vegelahn *v.* Gunter, 167 Mass. 92, 107–108, 44 N. E. 1077, 1081. These views are still adhered to. See Holmes, J., in Coppage *v.* Kansas, 236 U. S. 1, 27.

[18] There seems no immediate danger of over-correction. Even where unionism is particularly favored by law, experience has shown that the employer still largely controls the situation. See Federated Engine Drivers', etc. Ass'n *v.* Broken Hill Proprietary Co., 5 C. A. R. (Australia) 9, 27.

[19] There is much food for thought in the system the Australian Federal Government has evolved, although constitutional difficulties might be encountered in its adoption in this country. COMMONWEALTH CONCILIATION AND ARBITRATION ACT, 1904–1911. All interstate strikes or lockouts are criminal. §§ 4, 6. See *Ex parte* Hart, [1905–07] C. A. R. 107. A special court of Conciliation and Arbitration has been constituted which has power to initiate conferences and take jurisdiction of all industrial disputes and prevent and settle them. §§ 4, 16, 18. This includes the power to fix a scale of min-

TESTING THE RELIABILITY OF THE LAY HANDWRITING WITNESS. — Since the value of opinion evidence rests entirely upon the degree of accuracy which the witness's special skill or peculiar knowledge gives to his conclusions, and since juries tend to give undue credence to unsupported statements of opinion, no test should be forbidden which, by displaying the ability of the witness to deal with the problem under investigation, throws light upon the true value of his testimony. The untrustworthy nature of lay opinion evidence as to handwriting [1] makes this especially true in that case.[2] Yet a recent North Carolina decision holds that such a witness cannot be tested on cross-examination by being asked to pass upon the authenticity of specimen genuine and forged signatures, though their authorship be proved in a manner that would make authentic signatures admissible for the purpose of comparison in the direct examination. *Fourth National Bank of Fayetteville* v. *McArthur*, 84 S. E. 39.[3]

Such a result, from the layman's point of view, must no doubt seem a palpable error. The principle underlying all evidence as to handwriting is that all the signatures of any one individual display common distinguishing characteristics. Hence the estimation of the authenticity of specimen true and forged signatures of the reputed author displays specifically the ability of the lay witness to identify the signatures of that particular person, and thus provides an exceptionally accurate test of the merit of his opinion.[4] In addition, this test is the only means whereby the value of his testimony can be satisfactorily determined; for with a lay witness who employs the principles of no science, recourse cannot be had either to professional reputation or an examination as to scientific understanding.[5] Finally, as the judging of hand-

---

imum wages. § 40 (*b*). Rural Workers' Union *v.* Maldura Branch, etc. Ass'n, 6 C. A. R. 61. And to determine a great variety of the conditions of employment. Merchant Service Guild *v.* Com. S. S. Owners' Ass'n, 6 C. A. R. 6. In order to facilitate arbitration organization of labor is indispensable. See Australian Tramway Employees Ass'n *v.* Prahran, etc. Trust, 6 C. A. R. 130, 143. Accordingly, the act provides that neither employer nor employee may refuse to offer or accept employment because the other is a member of an organization. §§ 9, 10. And the court may decree that preference be given union men. § 40 (*a*). Australian Tramway Employees Ass'n *v.* Prahran, etc. Trust, *supra*. Under a similar New South Wales act it has been held that such preference will be decreed as a matter of course whenever the Association substantially represents the employees of an industry. Trolley Draymen and Carriers Union *v.* Master Carriers Ass'n, 4 N. S. W. A. R. 38.

[1] Generally lay witnesses who have seen the reputed author write, or whose business experience has acquainted them with his hand, are permitted to express their opinion as to the authenticity of the disputed signature. Keith *v.* Lothrop, 64 Mass. 453; Hammond *v.* Varien, 54 N. Y. 398; Hammond's Case, 2 Me. 33.

[2] See Browning *v.* Gosnell, 91 Ia. 448, 458, 59 N. W. 340, 344.

[3] A statement of the facts of this case appears in RECENT CASES, p. 708.

[4] Such an experiment is an equally thorough test of the merit of the expert witness. See Hoag *v.* Wright, 174 N. Y. 36, 43, 66 N. E. 579, 581. Rarely is a problem which so thoroughly tests the witness's ability to deal with the matter in hand, united with so infallible a basis for determining the correctness of his answer.

[5] The only other possible way of estimating the lay witness's ability is on the basis of former instances of his skill. Even in the rare cases where such instances exist, such a basis has many objectionable features from which the court-room test is free. See 2 WIGMORE, EVIDENCE, § 1005 *d*. The situation as to the expert is almost identical. As the identification of handwriting is not recognized as a distinct profession, little can be learned from the professional reputation of the witness. An examina-